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SPEECH BEFORE
THE ASSOCIATION OF DANISH LABOR LAW

"THE ADMINISTRATION OF U.S. LABOR LAW AND EFFORTS AT PROCEDURAL REFORMS AT THE NATIONAL LABOR BOARD"

Delivered by:

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"Labour Market House"
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It is an honor and a pleasure to discuss with you some of the current issues facing the National Labor Relations Board and the U.S. industrial relations system. I have long been a student of your industrial relations system and an admirer of your beautiful country. So, I am especially pleased to have this opportunity to visit Denmark for the first time in my capacity as Chairman of the National Labor Relations Board -- though this is my third visit here, the most recent one since 10 years ago.

As you may be aware, the National Labor Relations Board is one of the independent regulatory agencies established in the Roosevelt New Deal era.[1] The NLRB is composed of a 5-member Board appointed by the President and confirmed by the Senate. By custom, the Chairman and two other members are from the Administration's party, and the other two are from the other party.

Since the Taft-Hartley amendments of 1947, the agency has had a General Counsel who also is appointed by the President and who prosecutes cases which are brought before the Board for adjudication.

Our agency administers the National Labor Relations Act, the legal framework for collective bargaining. It was passed by the Congress in 1935 and has been amended three times since. The NLRB has 1,924 permanent employees in 33 regional offices throughout the country and in its Washington headquarters.

The agency performs two principal functions. We conduct about 3,000 secret ballot elections each year to determine whether a majority of employees or other employing unit wish to be represented by a union or to cease to be represented by a union. Our second function is to adjudicate charges of unfair labor practices by employers or unions that arise in the context of the elections and charges of failure to bargain in good faith in contract negotiations between employers and unions. Our agency receives about 40,000 unfair labor practice charges each year. More than 90 percent are resolved relatively quickly at the regional level.

As you are aware, the predominant bargaining structure in the United States is between individual employers and unions at the plant level. Association or multi-employer bargaining is relatively uncommon. The majority of individual employee complaints in unionized employers are handled by private grievance and arbitration procedures. Our agency's policy is to encourage private dispute resolution processes, and we defer to the decisions of private arbitrators in most situations.

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[1] For a history see James A. Gross, *The Making of the National Labor Relations Board,* (State University of New York Press 1974); *The Reshaping of the National Labor Relations Board,* (State University of New York Press 1981); and *Broken Promise,* (Temple University Press 1995). See generally Irving Bernstein, *Turbulent Years. A History of the American Worker 1933-1941,* (Boston, Houghton, Mufflin Co. 1970). See William B. Gould IV, *A Primer on American Labor Law,* (The MIT Press Cambridge, Massachusetts, and London, England, Third Edition, 1993), and R. Gorman, *Basic Text on Labor Law* (1976).

When I recently passed the three-year point in my term as Chairman of the NLRB, I took the opportunity to look backward over the period and to the future as well. We can report considerable progress in carrying out the agency's mission of enforcing the National Labor Relations Act and implementing several new initiatives to make our processes and procedures more effective and efficient. Yet, much remains to be accomplished.

My goals remain the same as when I took the oath of office in March 1994. My primary mission was to uphold the law impartially, to promote balance between labor and management, to bring both sides closer together by fostering a more cooperative environment -- both through Board procedures and substantive law. I also pledged to workers, union officials and business people that they would be treated with respect, civility and fairness. Finally, I have tried to reduce the need for litigation and to simplify and expedite NLRB procedures so that the case backlog can be diminished and both sides have a fair prospect of receiving an answer to legal questions which arise. In the main, these initiatives have been successful -- though some aspects of my reforms have met with resistance.

I view the role of Chairman as most akin to my former role as an impartial arbitrator, mediator and fact-finder in both the private and public sector. In both jobs, my role has been to decide cases based on the facts and relevant law, not to fashion legislation. For over three decades, I arbitrated and mediated more than 200 labor disputes. I would hope that all of my work as an arbitrator -- interpreting collective bargaining agreements, sometimes making recommendations about agreements and sometimes imposing agreements -- has demonstrated a sense of balance and impartiality. And that is what I have brought to bear on my work as Chairman of the National Labor Relations Board.

Enforcement Rate

As you may know NLRB decisions are subject to review upon appeal to U.S. Circuit Courts of Appeals and by the Supreme Court, a relatively infrequent occurrence in the case of the Supreme Court.

One of the most reliable baseline indicators of the impartiality of Board decisions is how well they fare upon appeal to the U.S. Courts of Appeals. I am proud that the Board's decisions during my tenure have been enforced by the courts in whole or part about 80% of the time. Of the 82 court decisions handed down during the period October 1996 -- March 1997, the Board prevailed in 85% of contested cases involving review or enforcement of its orders, with 75% complete wins while 10% involved modification or partial remand.

Supreme Court Review

Similarly, the Supreme Court has accorded deference to NLRB decisions. The Court upheld the Board in each of the three cases before it during this past term.

In *NLRB v. Town & Country*[2] the Court unanimously held that paid union organizers are "employees" with in the meaning of the Act and are, therefore protected against employer retaliation. In *Auciello Iron Works Inc. v. N.L.R.B.*[3] the Court again unanimously upheld the Board's position that an employer may not refuse to bargain with an incumbent union on the ground that it has lost majority status where it has previously entered into a contract with the union. And, third, the Court in *Holly Farms Corp. v. N.L.R.B.*[4] held that some workers involved in chicken processing were "employees" within the Act and not excluded by the Act's agricultural employee exemption. As in many past decisions the Court noted the Board's expertise and reiterated its policy of deferring to the expert agency's interpretation of its own statute.

The language employed by the Supreme Court, coupled with its holdings, indicate that the Board's credibility with the Court has never been better. And the same is true throughout the federal judiciary.

Advisory Panels

One of our first actions after confirmation was to appoint Advisory Panels composed of distinguished union and management labor lawyers, 26 of each. These panels serve without compensation and meet twice each year to advise the Board and General Counsel on improving agency service to the public. The panels have provided an invaluable sounding board for the agency on various policy issues and a link to the labor law bar and our constituents in labor and industry. A number of proposed reforms have been discussed with the Advisory Panels including the greater use of postal ballots in union representation elections, a proposal to adjust the Board's jurisdictional standards for inflation, Administrative Law Judge reforms an a number of other issues involving our agency.

Board Speed Teams and Superpanels

For many years a recurring criticism of the NLRB in our Washington head office has been the time required for the rendering of its decisions -- justice delayed is justice denied.

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2 116 S. Ct. 450 (1995),

3 116 S. Ct. 1754 (1996).

4 116 S. Ct. 1396 (1996).

In an effort to respond to this complaint, the Board has adopted two innovative changes in its procedures designed to speed up the processing of simpler and less controversial cases. They are called "Speed Teams" and "Superpanels."

In a speed team case, the issues are presented orally to a Board member and, after discussion, a written decision is prepared within a matter of days so that the Board member can approve the written decision while the case is still fresh in his or her mind. This procedure eliminates the preparation of duplicative documents in cases which are essentially factual and where credibility determinations have already been made -- either by an Administrative Law Judge in an unfair labor practice hearing, or by a Hearing Officer in a dispute arising out of a representation proceeding. We have used the speed team procedure in more than 570 cases, about 30 percent, since it was adopted. The result has been a approximately 20 percent reduction in the processing time of cases that come to the Board for decision. The median processing times were reduced from about 105 days in 1993 to 84 days in 1996.

The Superpanel system was implemented in November 1996 for processing certain cases carefully pre-selected by the Executive Secretary. Under this procedure a three-member panel meets weekly to hear cases which lend themselves to quick resolution without written analyses by each Board member's staff. Most of the cases are discussed briefly and are quickly and unanimously resolved based on straightforward application of settled precedent, most within a few days of their receipt by the Board. This procedure quickly focuses the attention of the three-member panel on the cases without delays for preparation of written staff analyses.

Since the Superpanel procedure was implemented, of the 151 cases referred to the panel, 125 were resolved unanimously, 16 with a dissent, and 10 were not resolved. This innovative procedure was used to quickly resolve one-third of the representation cases received by the Board since it was adopted last November.

Innovations in Administrative Law Judge Rules

Another area where innovative procedures have been adopted involves our agency's 62 Administrative Law Judges who are the first level of appeal of unfair labor practice findings by our regional offices. The agency now has fewer judges than at any time in recent history. Their numbers have been reduced by attrition from 117 in 1981 to 62 today. More than 1,000 cases are resolved by our judges each year by decisions and settlements. The hearings conducted by our judges often last several weeks or more and produce lengthy transcripts of hundreds and even thousands of pages. The median time required for the judges' decisions to be rendered following the conclusion of the hearing in fiscal '96 was 111 days (62 days from receipt of briefs). These cases consume considerable resources of the NLRB and of the parties. So, this was the first area we studied for ways to improve. Our efforts produced proposals for three changes: (1) the creation of an informal settlement judge process designed to produce settlements agreeable to the parties through informal conferences, thus avoiding lengthy hearings, briefs and appeals; (2) adoption of a

rule permitting the judges to hear oral arguments, dispense with briefs and issue on-the-spot bench decisions in appropriate cases; and (3) the adoption of time targets for the issuance of Administrative Law Judge decisions.

These proposals were discussed within the agency and with the union and employer advisory panels. Some skepticism was expressed, but a decision was reached to have a one-year trial period for the settlement judge and bench decision rules commencing February 1, 1995. The trial was deemed successful, and the new procedures were made permanent effective March 1, 1996.

We are very proud of the results achieved to date under the new procedures. We have reached settlements in a little more than two-thirds of our settlement judge referrals. Through April 1997, we assigned settlement judges in 199 cases, and 136 were successfully resolved without formal hearings, lengthy transcripts or costly appeals to the Board in Washington and possibly from there to the Courts of Appeals. Settlement judges are assigned the more complicated cases where long hearings are anticipated, so the savings are even greater than indicated by the 62-day median from receipt of briefs to decision. Settlements achieved result in significant savings in time and money to the agency and to the parties. Perhaps an even more important consideration is that settlements which are mutually agreed upon by the parties may contribute toward better relationships between labor and management than resolutions reached through often bitterly contested litigation.

The bench decision procedure has also produced worthwhile results, although in a smaller number of cases. From February 1995 through April 1997 ALJs issued 48 bench decisions. In fiscal 1996 bench decisions constituted 4.5% of the total decisions issued by the judges. Twenty-nine different judges have issued bench decisions. Most of the cases in which bench decisions were issued followed one or two-day hearings and involved simple credibility issues. Most of the bench decisions were not appealed and were adopted, in the absence of exceptions, by the Board. None of the bench decisions affirmed by the Board has been reviewed in the Courts of Appeals, although an enforcement petition has been filed and is pending in one of the cases. It does not appear that any party has made a serious procedural attack on the bench decision rule in any case thus far. The savings to the agency and to the parties resulting from bench decisions are significant but not as great as with settlement judges because they are used for less complicated cases which require shorter hearings, briefs and which would typically require less time for the judge to render a full written opinion.

When the settlement judge and bench decision procedure was introduced a three-day training session in mediation techniques was conducted for all judges. Additional training is planned with the goal of increasing the use of these new techniques.

In a separate action, in September 1994, the Board began phasing in time targets designed to reduce the time for Administrative Law Judges to issue their decisions. The targets became fully effective in May 1995, and the results are encouraging. The median number of days from hearing to decision had dropped from 138 days in 1993 to 128 in 1994

to 114 in 1995 and to 111 in 1996. The median time from when briefs are filed to decision decreased from 83 days to 62 days over the same period. To give you an idea of the resources involved in this process, the average hearing transcript for these hearings was 603 pages in 1996. These are complex, vigorously contested cases.

Overall, our Administrative Law Judges issued 442 decisions and obtained 725 settlements in 1996; the latter settlements constituted a 13 percent increase over 1995. This significant improvement reflects greater emphasis by the Clinton Board on settling cases wherever possible in order to reduce the cost and delay of litigation.

Providing Incentives for Voluntary Compliance

The National Labor Relations Act provides for the use of injunctions in event of certain violations of the Act. During my tenure, the Board's use of injunctions pursuant to Section 10(j) of the Act has increased as a means of quickly putting a stop to certain violations of the Act by employers or unions and to provide an incentive for voluntary compliance.

To date in Fiscal 1997, the Board has authorized injunctions in 31 cases and denied authorization in three cases. And during the entire three years and two months under the Clinton Board, injunctions have been authorized in 253 cases compared to 106 cases under the previous Board. The Clinton Board voted to deny authorization for injunctions in 13 cases. I voted with the majority in each of the 13 cases and to deny authorization in two additional cases as well. In recent months the number of injunctions has been reduced, we hope in part because the parties have received the message that the Board is prepared to take prompt and effective action to stop egregious violations in cases where delay would render Board remedies ineffective.

One of the highlights of my tenure to date was participating in the Board's March 26, 1995 decision to seek injunctive relief against unfair labor practices by major league baseball clubs. The agency played a decisive role in saving both the 1995 and 1996 baseball seasons and creating an environment in which a comprehensive collective bargaining agreement could be negotiated by the parties in November 1996.

Conclusion

Since the late '70s in the United States there have been increasing tensions and, in some instances, impasse between labor and management on the administration of labor law and the National Labor Relations Board. During the last 15 to 20 years, as the trade union membership percentage of the workforce declined and accelerated into a near free fall descent, polarization has come to the fore. More aggressive employer lobbying groups have appeared, sometimes displacing or subordinating more traditional and moderate organizations. Trade unions, increasingly frustrated by membership declines, for a time in the 1980s advocated a boycott of what they perceived to be an unsympathetic National Labor Relations Board.

Suspicion of the Board and its actions produced both a series of hearings in the '80s and early '90s and, more important, led to more complex negotiations and more partisan scrutiny by both the left and the right of nominees to the National Labor Relations Board and the federal bench as well. The requirement for advice and consent of the Senate has resulted in controversy and long delays in the confirmation of Board appointees.

Even before the election of the Republican majority 104th Congress in 1994, my nomination by President Clinton resulted in a nine-month stalemate in which a package of nominees, including a Republican from a short list from the Republican Congressional leadership, finally brought the matter to resolution.

The election of the 104th Congress drew the battle lines on two fronts. The first was the appropriation process. The budget negotiations and the two federal government shutdowns in the fall of 1995 adversely affected the NLRB in several ways. The NLRB, along with most of the rest of the federal government, was shut down twice for a total of 16 work days in the November 14 through January 5 period. The delay in the approval of the fiscal 1996 budget forced the government to operate under 13 separate continuing resolutions between October 1, 1995 through April 26, 1996.

The shutdowns caused the cancellation of approximately 250 representation elections and 350 hearings in representation and unfair labor practice cases leading to a 36 percent increase in the case backlog in the field over the previous year.

An estimated $8.8 million in non-recoverable fixed costs including salaries and rent were expended during the second shutdown during which more than 90 percent of agency employees were furloughed with full pay.

Needless to say, the recent overall budget agreement between the President and the Congress was welcome indeed. Now we are waiting to see how our small agency fares in the new appropriations process.

A second manifestation of heightened tension has been the Board member nomination process itself. Although one Board member's term expires each year thus creating an opportunity for the President to appoint a new Board member, there have been no confirmations since March 1994. This has meant that the President has been required to fill three vacancies through recess appointments. (These are stopgap appointments made during a Congressional recess in order to allow the Board to continue to function until a regular appointee is confirmed.) At present, however, the Board is functioning with only three members, two of whom are serving in a recess capacity without confirmation by the Senate. If the Senate recesses in November or December of this year without confirming new members, the Board will be required either to shut down or the President will have to make new recess appointments. Everyone agrees that a more desirable goal is for the Board to function with a full complement of five members who have been confirmed by the Senate.

Despite these handicaps the Board has moved ahead with its work over these past 38 months toward its overriding mission that I committed myself to during my October 1993 confirmation hearings before the Senate Labor and Human Resources Committee. It will continue to do so in 1997 and beyond.

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